SOME LEGAL ASPECTS OF FEDERAL CONTROL OF RAILWAYS

THE proclamation of the President taking possession of the transportation systems of the country is ascribed to the powers vested in him by the joint resolutions declaring war against Germany and Austria, the Act of August 29, 1916, "and by virtue of all other powers thereto me enabling." While there is no disposition to question the authority of the President's action, the powers which warrant it must be scrutinized to determine how far the control of railways extends, and the effect of government control upon our system of railway regulation.

The pertinent portion of the Act of August 29, 1916, reads as follows: [1]

> "The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary, of all other traffic thereon for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

This paragraph was added to the Army Appropriation Act, passed August 18, 1916. If we look to the history of this legislation to discover the intent, it will be found that the enactment was designed to take care of our troops in Mexico. Congress was on the eve of adjournment. The railroad brotherhoods were threatening a strike. To provide for our forces in Mexico this amendment was incorporated into the Army Appropriation Act.

It is apparent that there was no intent that all railways should be taken. The unification of our entire transportation system under government control was not contemplated. Our entry into the European War was at that time considered a rather remote contingency. There is, however, language in the statute which authorizes a wider exercise of power than perhaps Congress in-

[1] 39 STAT. AT L. 645 (1916).

tended. And we are all familiar with the attitude of the Supreme Court in construing statutes in the light of their history. If the history adds force to the construction found, it is usually cited. If it does not, the history is ignored.[2] But the whole intent of the statute is clearly confined to an executive function. It is a war measure; its purpose is transportation; it authorizes operation of trains; it authorizes no function of legislation, such as rate making, nor regulation, unless or except as they might be necessary to operation.

From this source of authority alone, the President is restricted to the explicit power conferred by the statute. An erroneous construction by the President of his authority under the statute would be no defense to an agent or officer exceeding the power conferred by Congress. In the *Flying Fish*,[3] a naval officer acting in obedience to the President's directions, which were themselves in excess of the power conferred by Congress, was held liable in damages.[4]

As Commander-in-Chief of the army, the President has war powers, which may under some circumstances authorize the taking of property without congressional warrant. These war powers are distinct from powers arising after a declaration of martial law. Where martial law has been declared, the civil laws are silent.[5] But there are war powers, independent of a state of martial law, which are constitutional powers, subject to constitutional limitations. The leading case on the war power is *Mitchel* v. *Harmony*.[6] In that case the court said:

"... in order to justify the seizure the danger must be immediate and impending and not remote or contingent. And that he might also take them for public use and impress them into the public service, in case of an immediate and pressing danger or urgent necessity existing at the time, but not otherwise."

The court further said:[7]

"But we are clearly of the opinion, that in all of these cases the danger must be immediate and impending; or the necessity urgent for the public

[2] Hoke *v.* United States, 227 U. S. 308 (1913).
[3] 2 Cranch (U. S.), 169 (1804).
[4] And see Mostyn *v.* Fabrigas, 1 Cowp. 161 (1774).
[5] *Ex parte* Milligan, 4 Wall. (U. S.) 2 (1866).
[6] 54 U. S. (13 How.) 115, 133 (1851). [7] *Ibid.*

service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for." [8]

The urgency and immediate necessity, the impending danger, are questions of fact. The decision of the President would have great weight in determining their existence. But if it be admitted that conditions required the seizure of the transportation system, the power over this system after seizure is still no greater than the public peril and necessity require. The necessity of operation may be granted. But there would scarcely be a necessity of rate legislation or regulation disassociated from operation. It was pointed out in *Wilson* v. *New*,[9] that while emergency may afford a reason for the exertion of a power dormant until the emergency arose, the emergency cannot call into life a power which has never lived.

During the Civil War, Congress enacted a statute authorizing the President to take over railroads and telegraph lines whenever the public safety required.[10] When the bill was before the Senate it was said by Senator Wade, of Ohio, that it was supposed that under the war power the Executive might seize this property without the authority of Congress, but it was thought better "that it should be done by authority of the law than by what may be considered by some as an usurpation." [11] It is interesting to note that at the same session a joint resolution was passed placing limitations upon the power of the Executive, prohibiting him from constructing new roads or completing those under contract for constructions, so great was the fear of government ownership of railways.

The power of the Executive, whether derived from the Act of August 29, 1916, or the war power inherent in the Commander-in-Chief of our armies, does not extend beyond the seizure and use of private property to meet the needs of the occasion. It is a restricted power to this extent. But in so far as the public necessity requires the exercise of that power, all individual rights must yield.

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[8] See also United States *v.* Russell, 80 U. S. (13 Wall.) 623 (1871); United States *v.* Pacific R. R., 120 U. S. 227 (1886); Dow *v.* Johnson, 100 U. S. 158 (1879); Moyer *v.* Peabody, 212 U. S. 78 (1909).

[9] 243 U. S. 332, 348 (1917).

[10] 12 STAT. AT L. 334 (1862).

[11] HANEY, CONGRESSIONAL HISTORY OF RAILROADS, vol. 11, 158.

RATES

A question has arisen if the Interstate Commerce Commission may still exercise its functions while the carriers are under government control. It is, of course, admitted that Congress may delegate its legislative power of rate-making to the President or to a director-general, as lawfully as to a commission. But in the Act of August 29, 1916, there is no such delegation of power. It must not only be specifically delegated, but the Act must describe the conditions, or rules, under which the tribunal or person shall exercise the legislative function.[12] "The true distinction," says Sutherland's "Statutory Construction," [13] "is between the delegation of power to make the law, which involves a discretion as to what the law shall be and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." [14]

The power to legislate as to rates seems entirely absent from the Act passed, and the war power, under which the President might have acted without congressional authority. If, however, the exercise of the power of operation requires as an incident thereto rate-making, or rate regulation, it might be done upon the principle that when a statute gives a right or imposes a duty, it confers by implication the power necessary to make the right available, or to discharge the duty.[15] But except under unusual conditions rate-making and operation are separate and distinct functions. Movement of traffic, expedition, efficiency, and unity of operation are only remotely dependent upon rates. Rates affect revenue and financial conditions. Their influence upon operation is oblique.

Unusual circumstances may bring a closer connection between rates and operation. If, for example, lumber, coal, or other commodities necessary for military affairs will not move upon the published rates, the rates would affect operation to such an extent that the Director-General might control them. A demurrage rule is a component part of rates. The demurrage rule providing drastic

[12] Field *v.* Clark, 143 U. S. 649 (1892), and cases cited; Butterfield *v.* Stranahan, 192 U. S. 470 (1903).

[13] (2 ed.) vol. 1, 148.

[14] Approved in Union Bridge Co. *v.* United States, 204 U. S. 364, 382 (1907).

[15] 2 SUTHERLAND, STATUTORY CONSTRUCTION, (2 ed.) § 510, and citations.

penalties for failure to unload cars lately issued by the Director-General is an example of when rates materially and actually affect operation. And such a rule could be issued under the Director-General's power without regard to the Commission. But in the absence of unusual conditions the Director-General has no power over rates. While analogies are dangerous, the Director-General's power over rates may be compared to the Commission's power over intra-state rates. The power in each instance exists when the commerce is obstructed. The power extends to remove the obstruction, and no further.

Under the pending bill in Congress, the railroads are to be paid a fixed revenue, guaranteed by the government, and any excess becomes the property of government. Does this change the rights of the public to have reasonable and nondiscriminatory rates? The carriers, of course, immediately lose interest in rate schedules. Their property rights are no longer affected.

The common-law right to reasonable charges grows out of the theory that: "When the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must to the extent of that interest, submit to be controlled by the public, for the common good, as long as he maintains the use."[16] When the public takes the place of the owner of the private property, the reason for regulation disappears. There is a merger of interests between the owner and shippers. The charges imposed become analogous to taxes, and there is no limitation upon the taxing power. The power to tax is a power to destroy.[17] There also seems to be no constitutional limitation upon the power of the government to charge discriminatory rates. The equality clause of the Fourteenth Amendment is a limitation only upon the states. And the direction that duties, imposts, and excises shall be uniform[18] would hardly afford protection to a shipper against discriminatory rates. Fundamental principles of justice and equity might be invoked, but with doubtful results.[19]

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[16] Munn *v.* Illinois, 94 U. S. 113, 115 (1876).

[17] McCulloch *v.* Maryland, 4 Wheat. (U. S.) 316, 431 (1819); McCray *v.* United States, 195 U. S. 27, 56 (1904).

[18] CONSTITUTION OF THE UNITED STATES, Art. 1, Sec. 8.

[19] Knowlton *v.* Moore, 178 U. S. 41 (1900).

The House Bill provides that rates, except as the President may order, shall continue to be determined as hitherto. In both the Senate and House bills the President is authorized to initiate rates which shall be "fair, reasonable and just." Complaint may be made to the Interstate Commerce Commission, which may review the rates so initiated, and (under the Senate Bill) make orders concerning them, and (under the House Bill) make findings which are reported to the President. It is not to be presumed that the Commission will consider schedules initiated by the Director-General, as it has in the past considered changes instituted by the carriers. And when the President is authorized "when the public interest requires," to increase rate schedules, a fundamental change in the angle of review results. The Commission would hardly be expected to take the attitude of a friend of the shipper, as has been its custom. It is of course apparent that the object of this presidential power is to increase the revenues of the carriers for the benefit of the government. The relationship of rates, questions of discrimination, and the reasonableness of particular rates will not be the objects of presidential inquiry. But the revenues as a whole may be increased by presidential fiat.

The presidential power may be exercised (by the Director-General) for either of two purposes: first, to prevent a deficit in revenues, and to secure the government against loss by reason of its guaranty to the carriers; second, to raise revenue for the government, under the clause which gives the government the excess over the guaranty. In either case the usual considerations affecting the reasonableness of rates are abandoned. A system of judicial inquiry, a chapter in our jurisprudence, has grown out of rate regulation. It is unfortunate that either to save the government from a contractual obligation, or to aid the government in raising funds, the test of rates shall be only the income they produce. It is a metamorphosis in our economic history that the government should take for its motto "all the traffic will bear."

Indirect taxation has generally been considered an unsound policy. It is conceivable that it will be a most unjust policy. It means a tax upon the necessities. It is also to be remembered that flat increases in rates necessarily result in discriminations. By reason of differentials, river crossings, etc., rates increased by a fixed percentage lose their relationships. Rate structures as a whole are

disturbed in their relative character. And the area of competitive trading is narrowed with every rate increase.

Regulatory Statutes

An argument was lately made in the House of Representatives by Mr. Lenroot, a student of government regulation, that the vesting of control of operation in the government did not repeal the statutes regulating carriers with the exception of the anti-pooling provision. It is true that the sovereign government is subject to general laws passed for the general welfare.[20] Statutes regulating carriers are general laws for the general welfare. But the foundation of such laws was our economic theory of government. "According to them (the Sherman Act and similar statutes) competition not combination, should be the law of trade." [21] "The Sherman law," said Mr. Brandeis, "lays down a rule of action, which declares an economic proposition, which I believe to be economically sound." [22]

But the anti-trust laws, in spite of the decisions in *United States* v. *Joint Traffic Association*,[23] and *United States* v. *Trans-Missouri Freight Association*,[24] have long been dead statutes as to railroads (except as to stock ownership).[25] Railroad rate competition has ceased. Section 6 of the Act to Regulate Commerce, requiring carriers to publish their rates and not change them except upon statutory notice, was a far more effective instrument for preventing rate competition than traffic agreements or any other contracts in restraint of trade. And the present power of the government is to do the very thing, or one of the things, the anti-trust laws prohibited. No argument is needed to show that the anti-trust laws are suspended during government operation. Other statutes which grant certain rights to shippers and the public must also yield to the sovereign power. The shipper's right to route his shipments [26] must fall. And the common-law right of the shipper

[20] United States *v.* Knight, 14 Pet. (U. S.) 301 (1840); United States *v.* Herron, 20 Wall. (U. S.) 251 (1873).

[21] National Cotton Oil Co. *v.* Texas, 197 U. S. 115, 129 (1905).

[22] Hearings before Judiciary Committee on Clayton Amendment (1914), 665.

[23] 171 U. S. 505 (1898).

[24] 166 U. S. 290 (1897).

[25] United States *v.* Union Pac. R. R., 226 U. S. 61 (1912).

[26] 36 Stat. at L. 551, § 12 (1910).

to have his goods transported upon reasonable notice and demand may be abrogated by the government's diversion of cars and equipment to other divisions, or other lines.

Power of the States to Tax Railroads under Federal Control

The fundamental principle of taxation is expressed in *McCulloch* v. *Maryland*:[27]

"All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation."

And in *Coe* v. *Errol*[28] it was said:

"We take it to be a point settled beyond all contradiction or question, that a State has jurisdiction (for taxation) of all persons and things within its territory which do not belong to some other jurisdiction, such as the representatives of foreign governments, with their houses and effects, and property belonging to or in the use of the Government of the United States."

It is thus apparent that the question of ownership becomes important in considering questions of taxation. The property rights the government obtains in railroads when it takes them over for operation must be borne in mind. It is undeniable that today the government has no property right in the carriers which it has taken possession of. It has seized them for the purpose of operation only. The bill now pending before Congress which provides for a guarantee to the carriers of a stated revenue does not change the relation of the government to the carriers. The government is still only a guarantor with no property right in the carrier, or the carrier's revenues. If the government owned the carriers, the states, of course, could not tax them.[29]

The nearest analogy on the question of the power of a state to tax instrumentalities of government, such as the carriers now are, is found in the case of *Union Pacific Railroad Co.* v. *Peniston*.[30] The government issued bonds in behalf of the carrier to the amount

[27] 4 Wheat. (U. S.) 315, 429 (1819). See also Kirtland *v.* Hotchkiss, 100 U. S. 491 (1879).

[28] 116 U. S. 517, 524 (1886).

[29] McGoon *v.* Scales, 9 Wall. (U. S.) 23 (1869).

[30] 18 Wall. (U. S.) 5 (1873).

of $16,000 per mile, which became a first mortgage on the carrier's property. In default of redemption of the bonds when due, the government had the right to take possession of the railroad for the use and benefit of the United States. It thus had a financial interest in the operating revenues of the road similar to the government's financial interest in the revenues of the roads now seized. The court said: [31]

". . . the Union Pacific Railroad Company was created to subserve, in part at least, the lawful purposes of the National government; . . . They [charter provisions] all look to a purpose of Congress to secure an agency competent and under obligation to perform certain offices for the General government. Notwithstanding this, the railroad and the telegraph line are neither in whole nor in part the property of the government. . . .

"Admitting, then, fully, as we do, that the company is an agent of the General government, designed to be employed, and actually employed, in the legitimate service of the government, both military and postal, does it necessarily follow that its property is exempt from State taxation?"

In answering this question, the court said: [32]

"It is, therefore, manifest that exemption of Federal agencies from State taxation is dependent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of Federal powers." [33]

The states cannot tax the means employed by Congress to carry into execution powers conferred upon Congress by the Constitu-

[31] 18 Wall. (U. S.) 5, 31 (1873).

[32] 18 Wall. (U. S.) 5, 36 (1873).

[33] The same ruling is made in Thomson *v.* Pac. R. R., 9 Wall. (U. S.) 579 (1869). See also Massachusetts *v.* Western Union Telegraph Co., 141 U. S. 40 (1891); Central Pac. R. R. *v.* California, 162 U. S. 91, 125 (1896); Western Union Telegraph Co. *v.* Massachusetts, 125 U. S. 530 (1888). These cases all follow the doctrine laid down in Union Pac. R. R. Co. *v.* Peniston, *supra*, note 30. See Crandall *v.* Nevada, 6 Wall. (U. S.) 35, 44 (1867). See also South Carolina *v.* United States, 199 U. S. 437 (1905); Choctaw, etc. R. R. *v.* Harrison, 235 U. S. 292 (1914).

tion,[34] nor a franchise conferred by Congress.[35] But the means employed by Congress to carry into execution its powers do not extend to the property of the instrumentality. A state cannot tax the interstate transportation of carriers or revenues derived from the interstate transportation,[36] but it may tax the property of the carrier in its jurisdiction which makes possible those revenues.[37] It should be noted that it has been held that Congress may exempt from state taxation the entire agency of carrying into execution its powers, if it sees fit. Mr. Justice Swayne, concurring in the judgment in *Union Pacific Railroad Co.* v. *Peniston*,[38] said:

"But I hold that the road is a National instrumentality of such a character that Congress may interpose and protect it from State taxation whenever that body shall deem it proper to do so." [39]

The national bank tax cases go further in restricting the power of the states to tax. In *Mercantile Bank* v. *New York*[40] it was said:

". . . and neither the banks themselves nor their capital, however invested, nor the shares of stock therein held by individuals, could be taxed by the States in which they were located without the consent of Congress, being exempted from the power of the States in this respect, because these banks were means and agencies established by Congress in execution of the powers of the government of the United States."

The court holds the express consent of Congress necessary to enable the states to tax any property of national banks. In *People* v. *Weaver*[41] it was said:

"That the provision which we have cited was necessary to authorize the States to impose any tax whatever on these bank shares, is abundantly established by the cases of *McCulloch* v. *The State of Maryland*,

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[34] Providence Bank *v.* Billings, 4 Pet. (U. S.) 514 (1867); Society for Savings *v.* Coite, 6 Wall. (U. S.) 594 (1867); Provident Institution for Savings *v.* Massachusetts, 6 Wall. (U. S.) 611 (1867); Van Brocklin *v.* Tennessee, 117 U. S. 151, 177 (1886); Wisconsin R. R. Co. *v.* Price Co., 133 U. S. 496 (1890).

[35] California *v.* Central Pac. R. R. Co., 127 U. S. 1, 38, 40 (1887).

[36] Kansas City Ry. *v.* Kansas, 240 U. S. 227, 231 (1916), and cases cited.

[37] St. Louis Southwestern Ry. *v.* Arkansas, 235 U. S. 350 (1914).

[38] 18 Wall. (U. S.) 5, 37 (1873).

[39] See also Reagan *v.* Mercantile Trust Co., 154 U. S. 413, 416 (1894); Smyth *v.* Ames, 169 U. S. 466, 520 (1898); Minnesota Rate Cases, 230 U. S. 352, 425-32 (1913).

[40] 121 U. S. 138, 154 (1887).

[41] 100 U. S. 539, 543 (1879).

4 Wheat. 316; *Osborn* v. *Bank of the United States*, 9 *Id.* 738; *Weston* v. *The City Council of Charleston*, 2 Pet. 449." [42]

It is somewhat difficult to see the distinction between national banks as an agency of government, and railroads, aided to establish post roads and to carry troops and military supplies. Both are instrumentalities of the government. But in the case of railroads express exemption from state taxation seems necessary, and in the case of banks express permission to tax is necessary.

Compensation

If the seizure of the railways for operation is in the nature of a condemnation of private property for public use, the Act of August 29, 1916, would seem to be fatally defective because a method of compensation was not prescribed. The remedy for the owner is necessary to the validity of such a statute to fulfill the requirements of due process of law. A long line of cases holds that it is a condition precedent to the exercise of the power of eminent domain that the statute make provision for compensation.[43] The compensation need not be fixed prior to the taking, but some method must be provided, though the determination of the amount be subsequent to the seizure.[44] And the compensation may be determined by other methods than a jury trial.[45] This objection to the statute could only be urged, however, by the carriers. And if they saw fit to acquiesce in the taking, they would not be estopped from demanding just compensation under an implied contract in the Court of Claims.[46]

If the statutory remedy is incomplete, or improper, the owner is not debarred from his common-law remedy of trespass or eject-

[42] See also Owensboro National Bank *v.* Owensboro, 173 U. S. 664 (1899); Third National Bank of Louisville *v.* Stone, 174 U. S. 432 (1899); First National Bank *v.* Albright, 208 U. S. 548 (1908); City of San Francisco *v.* Crocker, etc. Bank, 92 Fed. 273 (1899).

[43] Searl *v.* School District, 133 U. S. 553, 562 (1889); Sweet *v.* Rechel, 159 U. S. 380, 398 (1895); Chicago, Burlington, etc. R. R. *v.* Chicago, 166 U. S. 226, 237, 238 (1896), and cases cited.

[44] Backus *v.* Fort Street Union Depot Co., 169 U. S. 557, 568 (1898); Cherokee Nation *v.* Southern Kansas Ry., 135 U. S. 641 (1890).

[45] Boom Co. *v.* Patterson, 98 U. S. 403, 406 (1878); United States *v.* Jones, 109 U. S. 513 (1883); Backus *v.* Fort Street Union Depot Co., *supra*, note 44.

[46] United States *v.* Great Falls Mfg. Co., 112 U. S. 645, 656 (1884); Kohl *v.* United States, 91 U. S. 367, 374 (1875).

ment.[47] But these common-law remedies may be lost by aquiescence in the taking, and leave only a right to apply for compensation.[48] It may be contended that the act giving to the Court of Claims jurisdiction over implied contracts would provide a method of compensation for any taking by the government. In *United States* v. *Great Falls Mfg. Co.*[49] the question whether or not the owner could enjoin the government from taking his property when no provision for compensation was made was expressly left open. And in *Union Bridge Co.* v. *United States*,[50] the act authorizing the Secretary of War to require the removal of a bridge over a navigable stream was attacked for its failure to provide a method of compensation. The court considered the question at length, and determined that there had been no taking of property in the sense of the constitutional inhibition, but the inference is plain that had there been a taking, the absence of a method of compensation would have been fatal.[51]

The pending bill in Congress offers a specific compensation. This is not a legislative matter but one for judicial inquiry.[52] But there is also a provision providing for an adjudication of the carriers' claims if the compensation offered is not accepted.

Senator Underwood has raised the question whether the contract for compensation should not be limited to two years by reason of the limitation on appropriations in Article 1, Section 8, Clause 12 of the Constitution. This clause declares Congress shall have the power:

"To raise and support Armies, but no Appropriation of money to that use shall be for a longer term than two years."

If the seizure of the railroads under the Act of August 18, 1916, is the exercise of any power of Congress, other than the power to raise and support armies, the two-year limitation would not apply.

In an opinion of Attorney-General Knox,[53] it is held that the

[47] Kaukauna Water Power Co. *v.* Green Bay, etc. Canal, 142 U. S. 254, 280 (1891).

[48] State *v.* Hessenkamp, 17 Iowa, 25 (1864); Dunlap *v.* Pulley, 28 Iowa, 469 (1870), cited and approved in Kaukauna Co. *v.* Green Bay, etc. Canal, *supra*, note 47.

[49] 112 U. S. 645 (1884).

[50] 204 U. S. 364 (1907).

[51] See also *In re* Montgomery, 48 Fed. 896 (1892); *In re* Mandersen, 51 Fed. 501 (1892).

[52] Monongahela Navigation Co. *v.* United States, 148 U. S. 312 (1893).

[53] 25 OPINIONS OF THE ATTORNEY-GENERALS, 105, 106.

two-year limitation does not apply to an appropriation for the payment of royalties on account of the construction of guns, etc., extending over a period of more than two years.

". . . it is not necessary to extend the meaning of the words 'to raise and support' beyond their ordinary signification in order to include the power to arm and equip armies when they are raised and supported. That power follows as of course from the power to declare war; to raise and support armies; to provide forts, magazines and arsenals; and to levy and collect taxes to provide for the common defence."

The power to declare war might include the power to prepare for war by implication, in the absence of such a specific power. But where the specific power to raise and support armies has a limitation, it seems a strained construction to derive the power to prepare from the power to declare war. The power to levy and collect taxes to provide for the common defense has generally been construed to empower nothing but the levy and collection of taxes. The phrase "to provide for the common defence" is only descriptive of the purpose of the levy and collection of taxes.[54]

The power to take possession of railroads may be derived either from the power to raise and support armies, or the power to establish post roads, or the power to regulate commerce.[55] In the present case, the seizure was clearly the exercise of the war power. This power has an express limitation of two years to the appropriations for carrying it into effect, and that limitation should apply to the pending bill before Congress. It is a limitation more of theory than of fact. If Congress enacts the statute, proposing to compensate the carriers on the basis of an average of net earnings, and the operation of the roads continues longer than two years, the appropriation for the payment of the government's guaranty would have to be renewed. Failing this, the carriers could go into the Court of Claims for compensation.[56] The contract witnessed by the pending bill and the carriers' acceptance of its terms would not be binding upon the government.[57] But a

[54] United States *v.* Boyer, 85 Fed. 425, 430, 432 (1898); STORY, THE CONSTITUTION, § 908 *et seq.*

[55] Monongahela Navigation Co. *v.* United States, 148 U. S. 312, 342 (1893); Chappell *v.* United States, 160 U. S. 499, 509 (1896); Wilson *v.* Shaw, 204 U. S. 24 (1907).

[56] Reeside *v.* United States, 2 Ct. of Cl. 1 (1866); United States *v.* Russell, 13 Wall. (U. S.) 623 (1871); Whiteside *v.* United States, 93 U. S. 247 (1876).

[57] Filor *v.* United States, 9 Wall. (U. S.) 45 (1869).

contract for the use of the property would be implied and the damages could be measured in the same way. The measure of damages would not be restricted to the terms of the pending bill, but they would, in all probability, be considered fair and equitable.

The legislation pending in Congress is being enacted upon the assumption that it proceeds from the war powers. Limitations attach to these powers, and it is at best a temporary relief from the dangers that threatened our transportation system. When peace is accomplished, the problem will be still unsolved. It is submitted that regulation under the Commerce Clause might have furnished that unity of operation and control which our military needs made urgent, and might also furnish adequate relief in times of peace. In the past our statutes regulating common carriers have been enacted for the fundamental purpose of preserving competition. Competition has been our economic policy. That policy, so far as railways are concerned, has been a shadow. Competition among carriers has ceased. If we frankly admit the change, and go forward to secure efficiency by unity of control and operation, it can be done by regulating statutes as well as by government ownership. It would mean of course radical changes in legislation. We would have a mandate directing pooling of freight in many instances, instead of a prohibition. We would have a prohibition against circuitous hauls and routing, except under special conditions, instead of carefully keeping open these avenues of waste. We would have an enforced pooling of equipment, under supervision, enforced traffic agreements and enforced combination. The Sherman Act would be turned "upside down and inside out." But the changes can be accomplished by regulation.

Irrespective of the political wisdom of government ownership, it would save the government the vast sums required for compensation. Though regulation may affect property rights, and in some instances may seriously impair values, regulation is not a taking of property. Carriers engaging in interstate commerce assume the risks of regulation. The contingency of regulation is written in their right to engage in interstate commerce.[58] The question of government ownership looms large as a political issue immediately after the war. There was a strong sentiment in Congress for

[58] Union Bridge Co. *v.* United States, *supra*, note 50; Louisville & N. R. R. *v.* Mottley, 219 U. S. 467 (1911), and cases cited.

retaining in the bill the original clause which provided that the government control and operation should continue until Congress directed otherwise.

A more effective instrument for obtaining government ownership is the power conferred on the President to invest government funds in the obligations of carriers maturing while under governmental control. Let us suppose a carrier with a bonded debt of many millions has outstanding short-term notes. The government purchases them. Is not the immediate effect, if the notes are of any considerable amount, to raise the bonds which are prior liens to par? Is not the only recourse of the government to secure its loan the purchase sooner or later of the prior liens? Some carriers have bonded debts in excess of their value. In such instances the government bids fair to become, willing or unwilling, an owner of the property.

Henry Hull.

WASHINGTON, D. C.